United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

ORIGINAL

76-7519

To be argued by
LAWRENCE J. MAHONEY

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

ANTHONY MUNOZ,
Plaintiff-Appellee,

against

FLOTA MERCANTE GRANCOLOMBIANA, S. A.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Reply Brief Amici Curiae Of American Export Lines, Inc.; American President Lines, Ltd.; American Trading Transportation Co., Inc.; Albatross Tankers Corporation; Crowley Maritime Corp.; Farrell Lines Inc.; Hudson Waterways Corp.; Lykes Bros. Steamship Co., Inc.; Manhattan Tankers Corporation; Matson Navigation Company; Moore-McCormack Lines, Inc.; Prudential Lines; Sea-Land Service, Inc.; Sea-Train Lines; States Steamship Company; Transeastern Shipping Corporation; United Maritime Tankers; and United States Lines, In Support of Flota Mercante Grancolombiana, S. A., Defendant-Appellant.

DOUGHERTY, RYAN, MAHONEY
PELLEGRINO & GUIFFRA
Attorneys for Amici Curiae
576 Fifth Avenue
New York, New York 10036

LAWRENCE J. MAHONEY,
E. D. VICKERY,
ROYSTON, RAYZOR, VICKERY & WILLIAMS
Of Counsel

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POINT I—The plaintiff-appellee's brief was factually misleading.

This case was selected as appropriate for the filing of an Amici Curiae brief, because it presented a clearly defined issue for the consideration of the Court, i.e. does a shipowner owe any duty to a longshoreman with respect to

latent defects in the stow of cargo loaded by that longshoreman's stevedore employer? The trial record revealed no serious factual dispute, and therefore this appeal submitted a clear cut legal question to the Court of Appeals.

However, the clarity of this issue has been obscured by the brief of the plaintiff-appellee, who has elected not to meet the appellant's legal argument head on. A simple fact situation was made deliberately complex by unsupported statements, conclusions and inaccurate paraphrasing of the testimony.

In like manner, the brief of the plaintiff-appellee fails to focus upon the legal issue, but rather diverts attention from that issue by reliance upon irrelevant authorities, or by interpretations and conclusions not warranted by those cases that are germane.

The many factual inaccuracies in the Munoz brief have been thoroughly enumerated by the appellant's attorney, who as trial counsel, is eminently familiar with the testimony elicited in the District Court. The Amici Curiae take particular exception to the appellee's apparent contention that the dangerous condition in the stow consisted of an uneven and inadequate "escape hatch pathway". The appellee's statement admitted on page 7 that dunnage should have been used and was not, and that the danger was compounded by covering the area with separation paper. However, the importance of the misuse by the longshoremen of dunnage and separation paper was deemphasized by the appellee's argument, which concentrated on the alleged inadequacy of the so-called pathway.

It is obvious that the appellee has characterized the area in the lower hold as a pathway in an effort to divert attention from the hidden and latent nature of the defect in the stow. Although the record does not support the argument, the appellee has contended that the "pathway" was visible from the deck, and therefore that the shipowner should

have been aware of the danger. This contention disregards Munoz' own testimony that the cargo, which was covered by separation paper, gave way beneath his feet.

The appellee's misleading review of the "facts" should not distract the attention of the Court from undisputed testimony that Munoz' stevedore employer stowed the cargo, used the dunnage and separation paper, and carried on the loading operation in a manner completely within the stevedore's discretion. Any dangerous condition caused by the stevedore's work was concealed by the separation paper used by the longshoremen, and therefore the defect was hidden.

Although the appellee evidently contends that the shipowner has a duty towards a longshoreman with respect to a latent defect in cargo stowed by his employer, it is not suggested how this alleged duty is to be discharged. The condition that caused the appellee's fall could not be detected unless the vessel's crew moved the stow to determine if it had been properly dunnaged beneath the separation paper. This shipowner had not the authority, the obligation nor the expertise to do.

POINT II—The plaintiff-appellee has misconceived the legal authorities.

Plaintiff-appellee has devoted a substantial portion of his legal argument (pages 12-15) to a consideration of the *Napoli* decision, 536 F. 2d 505, and Sections 343 and 343 A of the Restatement (Second) of Torts. It may be argued that any consideration of the *Napoli* decision is inappropriate here, because the Court of Appeals in that case considered the shipowner's responsibility with respect to an open and obvious condition. It was established in the instant case that any defect in the stow was covered by separation paper and could not be seen by the crew or by anyone else. Nevertheless, the appellee relies upon the

Napoli decision as support for the contention that the shipowner would be responsible whether the condition was obvious or latent.

In spite of the many decisions interpreting the Amended Act, it is the essence of the appellee's argument that a shipowner is responsible for any defective condition aboard the vessel, regardless of its origin, or the identity of the party causing it. In substance, the plaintiff still relies upon the prior concept of a shipowner's non-delegable duty, although that element has been eliminated by Congress and by the Courts. For example, the *Napoli* decision, upon which the appellee relies, stated at page 507

> "having abolished the doctrine of unseaworthiness as a basis of liability, Congress did not intend that a concept of negligence approximating no-fault liability should take its place. *Bess* v. *Agromar Line*, supra, 518 Fed 2d 741-2. Also eliminated was the concept of a non-delegable duty to provide a safe place to work. *I.D. Ramirez* v. *Toko Kaiun K.K.*, 385 F. Supp. 644, 651-53 (N.D. Cal 1974); *Slaughter* v. *S.S. Ronde*, 390 F. Supp. 637, 645 (S.D. Ga 1974), aff'd, 509 F. 2d 973 (Fifth Cir. 1975) (per curiam); *Slosvik* v. *Maremar Compania Naviera S.A.*, 399 F. Supp. 712 (W.D. Wash. 1975)."

This subject has been thoroughly considered by the United States Court of Appeals for the Fifth Circuit in a recent decision, as yet not reported officially. The Court considered together the appeals of two longshoremen who were injured in separate accidents under different circumstances. These appeals, both of which were decided by the Fifth Circuit on February 11, 1977, included *Gay* v. *Ocean Transport & Trading, Ltd.* Civil Action 74-1443, on appeal from the United States District Court for the Southern District of Florida, and *Guerra* v. *D/S, A/S Laly,* Civil Action 73-H-1559, on appeal from the United States District Court for the Southern District of Texas. These decisions are set forth in the addendum to this brief.

The Court of Appeals for the Fifth Circuit preceded its separate consideration of these appeals by a general review of the shipowner's responsibility under the Amendments to the Longshoremen and Harbor Workers Compensation Act, in language that emphasizes the fallacy of the appellee's position in the *Munoz* case. The cornerstone of the Court's opinion was Section 905 (b) of the Amended Act, providing in substance that an employee of a stevedore shall have no cause of action for an injury caused by the negligence of other stevedore employees. At the same time, the Fifth Circuit gave full consideration to the effect of Sections 343 and 343 A of the Restatement (Second) of Torts, demonstrating that there is no conflict among these concepts, if applied reasonably. The Court further stressed the importance of consistent application of these principles, in order to assure uniformity.

The Court of Appeals then reviewed the *Gay* and *Guerra* appeals, in the light of the general principles emphasized in the general discussion of the problem. Although the facts in each case are dissimilar, both are relevant to the instant appeal, as they demonstrate that Section 905 (b) of LHWCA was intended to apply to accidents such as that suffered by Munoz.

The action by *Roosevelt Gay* was similar to the Munoz suit in several important respects. Gay was injured because of the malfunction of a blower brought aboard the vessel by his stevedore employer to remove fumes from the cargo compartment. As in the instant case, the shipowner had no knowledge of the existence of the dangerous condition. The Court correctly characterized the plaintiff's claim, in language which would be appropriate in the Munoz suit, as an effort to reestablish the shipowner's non-delegable duty to provide a safe place to work. The Court cited *Napoli* as authority for the statement that the 1972 Amendments intended to free shipowners from suits of this type.

The action by *Elias Guerra*, considered by the Fifth Circuit with the Gay appeal, is similar to the circumstances in

Napoli, as both involved open and obvious conditions that had existed for a period of time. The Court specifically found that the condition was known to the shipowner, although it had been created by Shippers Stevedoring Co., the plaintiff's employer. The Court held that the shipowner was exonerated from liability by Section 905 (b) of IHWCA, although the decision upheld the applicability of Section 343 A of the Restatement. The Fifth Circuit expressly agreed with the Second Circuit's findings in *Napoli*, 536 F. 2d at 508, concerning a shipowner's obligation to warn of an open and obvious danger where the longshoremen might not be in a position to avoid the danger even though aware of it.

However, it is most significant that the Fifth Circuit did not invoke Section 343 A under the circumstances of the Guerra case. It is pointed out by the Court that the stevedore created the hazard and stated "this was not the type of danger that must be faced notwithstanding knowledge."

It is respectfully submitted by the Amici that the *Guerra* decision emphasizes that Munoz has placed unwarranted reliance upon *Napoli*. Both Guerra and Munoz were injured by conditions created by fellow longshoremen and not by the shipowner. The Court in *Napoli* considered a condition whose origin was not established, as there was nothing in the decision to indicate whether the crew or the longshoremen had placed the plywood on the drums where *Napoli* fell.

POINT III—The plaintiff-appellee would have this Court reinstate the shipowner's non-delegable duty which has been eliminated by Congress and the Courts.

The appellee's concept of the shipowner's obligation to detect and correct a hidden dangerous condition is tantamount to the non-delegable duty which has been eliminated by Congress and the Courts. This condition, created and

hidden by the longshoremen, could not be the subject of either actual or construal notice to the shipowner who had neither the right nor the duty to disturb the cargo after the stevedore loaded it, to ascertain whether it had been stowed properly. The plaintiff-appellee has cited no case imposing this duty upon the shipowner. In the absence of such a legal duty, there can be no fact question that the shipowner "should have known" of the condition, thereby creating constructive notice. To impose this duty upon the shipowner would be to reinstate its non-delegable duty and the no-fault concepts of unseaworthiness.

The appellee's further misconception of the shipowner's responsibility is revealed on page 15 of the plaintiff-appellee's brief, where it was argued that the shipowner would be responsible for the stowage of cargo, regardless of its control or participation. This additional effort to establish a non-delegable duty was premised upon the obligation of a contractor "performing work which is likely to create a peculiar unreasonable risk of physical harm to others unless special precautions are taken".

Aside from the question of whether loading of cargo is an activity likely to create an unreasonable risk of harm to others, the plaintiff-appellee disregards the numerous decisions imposing this obligation only with respect to third parties, and not to the employees of independent contractors, such as Munoz.

The Court of Appeals for the Second Circuit has interpreted New York law and has emphasized the distinction between injury to the general public and injury to the employees of an independent contractor performing the work. In 1960 the Second Circuit considered a claim based upon the contention that the work was inherently dangerous. The Court stated in *Wallach* v. *U.S.*, 291 F. 2d 69 at page 72:

> "Whatever may be the State Court's justification for allowing recovery by a pedestrian on the highway

against the property owner, it is clear that New York has never allowed recovery by an employee of a subcontractor in the present situation."

The distinction between a claim by a third party or by the general public and that of employees of independent contractors was later confirmed by the Court of Appeals for the Second Circuit, in *Galbraith* v. *U.S.*, 296 F. 2d 681; and also in *Lipka* v. *U.S.*, 249 F. Supp. 213, aff'd 369 F. 2d 288, cert. den., 386 U.S. 935 (1967).

Conclusion

This shipowner had no duty to detect or correct the dangerous condition, created and hidden by the stevedore. It was precisely this type of accident for which a shipowner was relieved of liability by Section 905 (b) of the Longshoremen and Harbor Workers Compensation Act, 33 U.S.C. Section 901 *et seq.* Therefore, the verdict in favor of the plaintiff should be reversed and judgment entered in favor of the defendant-appellant.

Respectfully submitted,

Dougherty, Ryan, Mahoney,
Pellegrino & Giuffra
Attorneys for Amici Curiae
576 Fifth Avenue
New York, New York 10036

Lawrence J. Mahoney
E. D. Vickery,
Royston, Rayzor, Vickery & Williams
Of Counsel

ADDENDUM

Decision of the Court of Appeals for the Fifth Circuit, dated February 11, 1977.

GAY VS OCEAN TRANSPORT & TRADING LTD., CIVIL ACTION 74-1443 GUERRA VS D/S, A/S LALY, CIVIL ACTION 73-H-1559

Before COLEMAN, CLARK and TJOFLAT, Circuit Judges.

TJOFLAT, Circuit Judge:

In each of these two cases a longshoreman in the employ of an independent stevedore sued the vessel on which he was working when injured. The cases present a common question: What standard of negligence is to be applied in suits brought against vessels under the amended Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq* (Supp. II 1972)? The parties and several amicus curiae have briefed this issue in a commendably comprehensive and articulate fashion. We will, therefore, first elaborate the standards we find appropriate in cases where a vessel is sued by an injured employee, and then we will apply those standards to the cases before us.

I

When Congress undertook revision of the LHWCA in 1972, it was faced with the problem of what to do about the judicial undermining of the exclusive liability provision for employers.[1] Under *Seas Shipping Co. v. Sieracki*, 328

[1] Act of March 4, 1927, ch. 509, § 5, 44 Stat. 1425, *now codified at* 33 U.S.C. § 905(a) (Supp. II 1972):

> The liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death.

U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), and *Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), the employee could sue the vessel for unseaworthiness and the vessel could then demand indemnity from the stevedore/employer on the theory that it had breached an express or implied warranty of workmanlike performance to the vessel.[2] The solution selected was to improve compensation benefits while at the same time making a vessel liable only for its own negligence rather than for unseaworthiness.[3] To effect this result, section 905(b) was added to the Act:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services,

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[2] *See generally Smith v. M/S Captain Fred*, —— F.2d ——, No. 75-1910 (5th Cir. Jan. 28, 1977); H.R.Rep. No. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News pp. 4698, 4702.

[3] The House Report put it in these words:

> Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. H.R.Rep. No. 1441, 92d Cong. 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News pp. 4698, 4703.

no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.[4]

Our task here is to flesh out what Congress intended by its use of the phrase "negligence of the vessel". For assistance we turn to the House Report and quote at some length.

> The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.
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> * * * * * *

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[4] 33 U.S.C. § 905(b) (Supp. II 1972). For discussions of the 1972 Amendments to the LHWCA and their effect, *see generally Landon v. Lief Hoegh & Co.*, 521 F.2d 756 (2d Cir. 1975), *cert. denied, A/S Arcadia v. Gulf Ins. Co.*, 423 U.S. 1053, 96 S.Ct. 783, 46 L.Ed.2d 642 (1976); *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054, 96 S.Ct. 785, 48 L.Ed.2d 648 (1976); *Croshaw v. Koninklijke Nedlloyd, B. V. Rijswijk*, 398 F.Supp. 1224 (D.Or 1975); *Ramirez v. Tako Kaisun*, 385 F.Supp. 644 (N.D. Cal. 1974); *Lucas v. "Brunhuus" Schiffahrts Ges.*, 379 F.Supp. 759 (E.D.Pa 1974).

Addendum.

. . . This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.

The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like.

* * * * * *

Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

* * * * *

Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation—just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have

acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

* * * * * * *

Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law be determined as a matter of Federal law. In that connection, the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of "assumption of risk" in an action by an injured employee shall also be applicable.[5]

From these passages and section 905(b) itself we distill the following conclusions:

(1) Congress intends for the federal courts to develop a uniform federal common law to control LHWCA suits against vessels.[6]

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[5] H.R.Rep. No. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News pp. 4698, 4702-05.

[6] *Cf. Moragne v. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) (uniform federal law to be applied in LHWCA actions); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953); *Robins Drydock & Repair Co. v. Dahl*, 266 U.S. 449, 457, 45 S.Ct. 157, 69 L.Ed. 372 (1925); *So. Pac. Co. v. Jensen*, 244 U.S. 205, 215, 37 S.Ct. 524, 61 L.Ed. 1086 (1917); *Branch v. Schumann*, 445 F.2d 175, 178 (5th Cir. 1971).

Addendum.

(2) That LHWCA federal common law is to be based on negligence concepts; the unseaworthiness of a vessel is not an acceptable ground for relief.

(3) LHWCA negligence law is to be guided primarily by analogy to land-based law concepts.[7] The stevedore is to be viewed generally as an independent contractor and its employees as invitees of the vessel owner.

(4) However certain common land-based principles of state law are not to be carried over into the federal law governing LHWCA suits. Assumption of risk may not be

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[7] In *Brock v. Coral Drilling, Inc.*, 477 F.2d 211 (5th Cir. 1973), we stated in dicta that section 905(b) places the shipowner, "in so far as third party liability is concerned, in the same position as land-based third parties in non-maritime pursuits." *Id.* at 213 n.1. Even a cursory examination of the legislative history demonstrates that the *Brock* court was correct. Moreover, the following courts have applied land-based concepts of negligence in section 905(b) suits: *Anuszewski v. Dynamic Mariners Corp.*, 540 F.2d 757 (4th Cir. 1976) (per curiam), *aff'g*, 391 F.Supp. 1143 (D.Md. 1975); *Butler v. O/Y Finnlines, Ltd.*, 537 F.2d 1205, 1206 n.2 (4th Cir. 1976); *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976); *Cummings v. "Sidarma" Soc.*, 409 F.Supp. 869 (E.D. La. 1976); *Solsvik v. Maremar Compania Naviera, S.A.*, 399 F.Supp. 712 (W.D.Wash.1975); *Croshaw v. Koninklijke Nedlloyd, B. V. Rijswijk*, 398 F.Supp. 1224 (D.Or.1975); *Frasca v. Prudential-Grace Lines, Inc.*, 394 F.Supp. 1092 (D.Md.1975); *Fitzgerald v. Compania Naviera La Molinera*, 394 F.Supp. 412 (E.D.La.1975); *Jackson v. Lykes Bros. Steamship Co.*, No. B-74-38 (E.D.Tex. July 16, 1975); *Robinsen v. Dixie Machine Welding & Metal Works, Inc.*, No. 74-533 (E.D.La. May 1, 1975); *Parker v. Costa Amatori S. P. A.*, No. 74-454-N (E.D.Va. April 23, 1975); *Johnson v. Zenith Navigation*, No. 74-1502 (E.D.La. Feb. 12, 1975); *Slaughter v. S. S. Ronda*, 390 F.Supp. 637 (S.D.Ga.1974), *aff'd per curiam*, 509 F.2d 973 (5th Cir. 1975); *Burree v. Flota Mercante Grancolombiana*, 386 F.Supp. 1105 (D.Or.1974); *Ramirez v. Toko Kaiun K. K.*, 385 F.Supp. 644 (N.D.Cal.1974); *Citizen v. M/V Triton*, 384 F.Supp. 198 (E.D.Tex.1974); *Fedison v. Vessel Wishca*, 382 F.Supp. 4 (E.D.La.1974); *Hale v. Maritime Overseas Corp.*, 380 F.Supp. 222 (E.D.Tex.1974); *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F.Supp. 759 (E.D.Pa.1974).

utilized as a defense, and comparative negligence, rather than contributory negligence, is to be applied.

Our brethern in the Second and Fourth Circuits have already faced the problem before us and have agreed that land-based principles are to guide in the establishment of a federal law. *Anuszewski v. Dynamic Mariners Corp.*, 540 F.2d 757 (4th Cir. 1976); *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976). Moreover, those circuits have both relied upon the Restatement (Second) of Torts for guidelines. 540 F.2d at 759; 536 F.2d at 508-09. In the interest of fulfilling the Congressional desire of uniformity, we, too, adopt the Restatement formulation. Restatement (Second) of Torts § 342 (1965) provides,

> A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,
>
> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
>
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
>
> (c) the licensees do not know or have reason to know of the condition and the risk involved.

Section 343 states,

> A possessor land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that

it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against danger.

Section 343 A continues,[8]

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

These general standards should be utilized in the future to assure uniformity in cases brought under section 905(b) of the LHWCA to recover for injuries caused by the negligence of the vessel. We proceed now to apply these standards to the cases before us.

II

A. No. 75-2729

Roosevelt Gay was employed as a longshoreman by Atlantic Stevedoring Co. On the date of his injury he was

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[8] Restatement (Second) of Torts § 343, comment a (1965), instructs that section 343 "should be read together with § 343 A"

assigned to operate a propane forklift in an unventilated reefer compartment aboard the M/V Prometheus. To remove the noxious fumes emitted by the forklift, a blower was placed on board the vessel by the stevedore. Unfortunately, the air hose connected to the blower was not long enough to reach into the reefer compartment. Approximately one hour after operations began, the plaintiff and other longshoremen working with him began to feel ill. Gay was removed from the vessel and taken to a local hospital, where it was determined that he had suffered carbon monoxide poisoning from the inhalation of the fumes.

Gay admits that the duty to provide a blower to remove the fumes from the compartment rested on his employer, the stevedore, and not on the vessel. He further acknowledges that the operators of the vessel had no knowledge that the dangerous condition existed. Still, they attempt to predicate a theory of possible vessel liability upon the fact that a federal regulation was violated. That regulation requires the employer to ascertain the quantity of carbon monoxide in a compartment like that in question here within thirty minutes after placement of a forklift into the compartment. 29 C.F.R. § 1918.93(a)(1)(i) (1976). This was not done by Gay's employer. Gay argues, however, that this regulation can provide the standard of care for a negligence action against the vessel.

We disagree. The vessel had no similar duty to check the carbon monoxide content of the compartment.[9] Gay's

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[9] C.F.R. § 1918.2(b) makes clear that the regulation only applies to employers and not vessels:

> It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of those regulations to relieve such owners, operators, agents or masters of vessels from responsi-

(*footnote continued on following page*)

argument is, in effect, that the vessel has a non-delegable duty to provide a longshoreman with a safe place to work. But this is exactly the type of liability without fault concept from which Congress sought to free vessels by the passage of the 1972 Amendments.[10] *Napoli*, 536 F.2d at 507; *Bess v. Agromar Line*, 518 F.2d 738 (4th Cir. 1975);

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bilities or duties now placed upon them by law, regulation or custom.

Even under the pre-1972 LHWCA, the general principle was that "liability for failure to comply with safety regulations should be imposed on the party exposing the injured employee to the dangerous condition." *Brock v. Coral Drilling, Inc.*, 477 F.2d 211, 215 (5th Cir. 1973). *See also Burrage v. Flora Mercante Grancolombiana*, 431 F.2d 1229 (5th Cir. 1970).

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[10] In *Teofilovich v. D'Amico Mediterranean/Pacific Line*, 415 F.Supp. 732 (C.D.Cal.1976), the Court refused to apply Restatement (Second) of Torts §§ 413 & 416 (1965) to hold a shipowner vicariously liable for the negligence of the stevedore, holding that this "would do violence to the letter and policy of 33 U.S.C. § 905(b). . . . Congress specifically excluded a rule of vicarious liability, specifically excluded a rule of liability without fault and specifically excluded the concept of a non-delegable duty, all of which are the express and explicit result of section 416." 415 F.Supp. at 734-36. *See also Frasca v. Prudential-Grace Lines, Inc.*, 394 F.Supp. 1092 (D.Md.1975); *Anuszewski v. Dynamic Mariners Corp.*, 391 F.Supp. 1143, 1145 (D.Md.1975), *aff'd*, 540 F.2d 757 (4th Cir. 1976) (per curiam); *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F.Supp. 759 (E.D.Pa.1974).

We repeat at this point the admonition of the House Report that "nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." H.R.Rep. No. 1441, 92d Cong. 2d Sess., *reprinted in* [1972] U.S.Code Cong. & Ad.News pp. 4698, 4704. *See also West v. United States*, 361 U.S. 118, 123, 80 S.Ct. 189, 4 L.Ed.2d 161 (1959); *Marant v. Farrell Lines, Inc.*, No. 73-2615 (E.D.Pa. Jan. 15, 1976); *Solsvik v. Maremar Compania Naviera, S.A.*, 399 F.Supp. 712 (W.D.Wash. 1975); *Frasca*, 394 F. Supp. at 1098. It is uncontroverted here, however, that the vessel did not have either actual or constructive knowledge of the dangerous carbon monoxide level.

Addendum.

Solsvik v. Maremar Compania Naviera, S.A., 399 F.Supp. 712 (W.D.Wash.1975); H.R.Rep. No. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S.Code Cong. & Ad.News pp. 4698, 4703. Section 905(b) instructs that a longshoreman does not have a cause of action against a vessel if his injury "was caused by the negligence of persons engaged in providing stevedoring services to the vessel." Such is the case here. Since the district court granted summary judgment for the vessel, that judgment must be affirmed.

B. No. 75-2441

Elias Guerra worked as a longshoreman for the Shippers Stevedoring Co. (Shippers). Shippers was hired to unload steel, varying in length from forty to sixty-five feet, from the vessel M/V Lyra. In order to remove the steel from its compartment, the ship's boom, operated by an employee of the stevedore, was first used to raise the steel enough to get wooden blocks underneath it. Then the boom was swung out of the way so that an on-shore crane and chains could be brought into the hold to remove the steel. The accident occurred when the ship's boom was swinging into position over the hold. The boom's breakout wire snagged on a 125-pound pallet which was stacked by the hatch coaming, causing it to fall about thirty feet into the hold and strike Guerra on the back of the head and right shoulder.

The pallets had been transported on top of the steel in the holds, and so prior to unloading they had had to be removed. This task was performed by the stevedore, and Shippers stacked them next to the hatch coaming after being informed by crew members that they could not be placed on the dock. Although the hazardous condition was readily apparent and brought to the attention of the supervisory personnel of Shippers by its longshoremen, the pallets were not removed or tied down to prevent what

foreseeably occurred. After a bench trial, the district court found that Shippers had been negligent in creating the dangerous condition, in failing to correct it and in its operation of the ship's cargo boom. The court found no negligence on the part of the vessel but did determine that the danger was open and obvious and as well known to the shipowner as it was to the stevedore. Applying land-based negligence concepts, the court concluded that the "shipowner was under no duty to warn the independent stevedoring contractor or his employees, including the plaintiff, of the open and obvious danger which the independent contractor created aboard the vessel and which was admittedly known and appreciated by the independent contractor's employees, including the plaintiff." Appendix at 125.

We hold that the district court had ample evidence to support his findings of fact and, hence, that they are not clearly erroneous. The court was also correct in adopting land-based negligence principles to decide this case, as we have already explained. It is clear that the vessel has no liability under section 905(b) since the sole cause of injury was the negligence of the stevedore.[11]

Comment need be made, however, about the possible intimation of the holding of the district court that a vessel has no duty concerning any danger which is open and obvious to the stevedore or its employees.[12] This indeed has

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[11] We have recently explained that in all tort cases, be they strict liability or ordinary negligence cases, causation must be established before recovery will be allowed. *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422 (5th Cir. 1977).

[12] We do not intend to fault the district court. It noted the open and obvious nature of the danger, but did not hold that that fact, operating alone, relieved the vessel of liability. Instead, Restatement (Second) of Torts § 343 A (1965), the appropriate guideline, was cited and, as we shall note in the text *infra*, appropriately applied. *See* Appendix at 126.

been the traditional rule concerning owners of land and their invitees,[13] and it has been applied in several suits brought under section 905(b). The traditional rule's appropriateness in LHWCA suits has been rejected by several courts, however,[15] for two cogent reasons.

First, the traditional rule has increasingly given way in recent years to the view that the obviousness or knowledge of a dangerous condition on certain property does not necessarily relieve the owner of his obligation to take further precautions to remedy the danger.[16] This modern trend has been reflected in section 343 A of the Restatement (Second) of Torts, which we adopted *supra*. We agree with the Second Circuit that "[a]lthough the invitee (or in this case the employee) may be under a duty to avoid harm likely to result to him from open and obvious dangers, he may not be in a position fully to appreciate the risk or to avoid the danger even though aware of it."[17] *Napoli*, 536 F.2d at 508.

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[13] The traditional rule is found in Restatement of Torts § 340 (1934): "A possessor of land is not subject to liability to his lincensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by any dangerous condition thereon, whether natural or artificial, if they know of the condition and realize the risk involved therein." Cases applying the traditional rule are collected in Annot., 35 A.L.R.3d 230, 244-53 (1971).

[14] *See, e. g. Cummings v. "Sidarma" Soc.*, 409 F.Supp. 869 (E.D.La.1976); *Robinson v. Dixie Machine Welding & Metal Works, Inc.*, No. 74-533 (E.D.La. May 1, 1975); *Fedison v. Vessel Wislica*, 382 F.Supp. 4 (E.D.La.1974); *Hite v. Maritime Overseas Corp.*, 380 F. Supp. 222 (E.D.Tex.1974). *See also Ramirez v. Toko Kaiun K. K.*, 385 F.Supp. 644 (N.D.Cal.1974).

[15] *See, e. g., Napoli v. Hellenic Lines*, 536 F.2d 505 (2d Cir. 1976); *Croshaw v. Koninklijke Nedlloyd, B. V. Rijswijk*, 398 F.Supp. 1224 (D.Or.1975); *Frasca v. Prudential-Grace Lines, Inc.*, 394 F.Supp. 1092 (D.Md.1975).

[16] *See generally* Annot., *supra* note 13, at 254-62.

[17] Dean Prosser in his treatise gives a more elaborate explana-

(*footnote continued on following page*)

Addendum.

The more telling criticism of the traditional rule, however, is that it is premised in large part on the concepts

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(*footnote continued from preceding page*)

tion of the modern rule:

> Likewise, in the usual case, there is no obligation to protect the invitee against dangers which are known to him, or which are so obvious and apparent to him that he may reasonably be expected to discover them. Against such conditions it may normally be expected that the visitor will protect himself. It is for this reason that it is so frequently held that reasonable care requires nothing more than a warning of the danger. But this is certainly not a fixed rule, and all of the circumstances must be taken into account. In any case where the occupier, as a reasonable man, should anticipate an unreasonable risk of harm to the invitee notwithstanding his knowledge, warning, or the obvious nature of the condition, something more in the way of precautions may be required. This is true, for example, where there is reason to expect that the invitee's attention will be distracted, as by goods on display, or that after lapse of time he may forget the existence of the condition, even though he has discovered it or been warned; or where the condition is one which would not reasonably be expected, and for some reason, such as an arm full of bundles, it may be anticipated that the visitor will not be looking for it. It is true also where the condition is one such as icy steps, which cannot be negotiated with reasonable safety even though the invitee is fully aware of it, and, because the premises are held open to him for his use, it is to be expected that he will evertheless proceed to encounter it. In all such cases the jury may be permitted to find that obviousness, warning or even knowledge is not enough. W. Prosser, The Law of Torts § 61, at 394-95 (4th ed. 1971) (footnotes omitted).

In *Brock v. Coral Drilling, Inc.*, 477 F.2d 211 (5th Cir. 1973), we recognized similar principles in a LHWCA case in which the 1972 Amendments were not applicable. In that case, the plaintiff Brock was aware of hazardous conditions existing on the vessel on which he was working, but continued to work after protests to his supervisor proved unavailing. We affirmed a finding that Brock had met the standard of ordinary prudence, noting that he was economically dependent upon the stevedore for future employment. *Id.* at 215.

of contributory negligence and assumption of risk.[18] As previously recounted, both of these concepts are inappropriate in section 905(b) cases. It would be wholly improper, then, indirectly to introduce these principles into LHWCA suits by adopting the traditional rule that if a hazard is open and obvious that fact alone absolves the owner of his negligence.[19]

Despite our rejection of the traditional rule, we still affirm the judgment of the district court in this case. Even though the crew of the vessel was aware of the dangerous condition presented by the stack of pallets, it was the stevedore who created the hazard in the first place and it was the stevedore that failed to tie the pallets down and then carelessly knocked one into the hold. This was not the type of danger that must be faced notwithstanding knowl-

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[18] *Napoli*, 536 F.2d at 508; Annot., *supra* note 13, at 236, 263-65, 269-72. Illustrative of those cases holding that the obviousness of a dangerous condition is proof of contributory negligence as a matter of law is *Parvino v. Wellman's Funeral Parlors, Inc.*, 176 So.2d 749 (La.App.1965). In *Parvino* the court held that, even if the steps on which the plaintiff fell were wet and slippery, since he had shortly before traversed them, he was aware of their condition and was thus guilty of contributory negligence in his misadventure. *Id.* at 751. *See also Romano v. Juneau*, 198 So.2d 499 (La.App.1967).

An example of the traditional rule utilizing the assumption of risk rationale is *Wade v. Roberts*, 118 Ga.App. 284, 163 S.E.2d 343 (1968). In *Wade* the plaintiff slipped and fell on a driveway over which was strewn loose gravel. The court held that "by walking thereon she assumed any risks incident thereto and was guilty of such lack of ordinary care for her own safety as would prevent a recovery." *Id.* at 287, 163 S.E.2d at 345. *See also Rogers v. Atlanta Enterprises, Inc.*, 89 Ga.App. 903, 81 S.E.2d 721 (1954); *Bradley v. Relph Nor-Tex Hide Co.*, 428 S.W.2d 481 (Tex.Civ. App.1968).

[19] Of course, that the danger is open and obvious or that the plaintiff had knowledge of the hazard will likely be highly relevant to the appropriate inquiry into the comparative negligence of the employee.

edge. The finding of the district court that the stevedore's negligence was the sole proximate cause of Guerra's injury is not clearly erroneous.

III

These cases have presented for our review the issue of what standard should be applied when a vessel is sued for its negligence under section 905(b) of the LHWCA. In the interests of uniformity among the courts of this circuit and throughout the federal system, we have adopted the formulation of the Restatemnt (Second) of Torts §§ 342, 343 & 343 A (1965).[20] Applying those standards to the cases before us, they are both hereby AFFIRMED.

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[20] By adopting as guidelines the land-based principles found in the Restatement (Second) of Torts, we do not indicate, of course, that vessel owners have the identical duties of owners of land. A ship presents its own special hazards. As always, a determination of the reasonableness of a defendant's actions (or lack thereof) requires an examination of all the circumstances surrounding the injury.

United States Court of Appeals
for the Second Circuit

Anthony Munoz,

Plaintiff-Appellee,

against

Flota Mercante Grancolombiana, S.A.,

Defendant-Appellant.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Antonio D. Ramos, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 10 Catherine Street, New York, New York

That on March 2, 1977, he served 2 copies of Reply Brief

on

Zimmerman & Zimmerman, Esqs.,
Attorneys for Plaintiff-Appellee
160 Broadway,
New York, New York,

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Antonio D. Ramos

Sworn to before me this
2nd day of March, 1977

John V. Esposito

JOHN V. ESPOSITO
Notary Public, State of New York
No. 31-4504390
Qualified in Kings County
Commission Expires March 30, 1977